Supreme Court, U. S.
FILED
SEP 18 1975
MICHAEL RODAK, JR., CLERK

No. 75-255

In the Supreme Court of the United States

OCTOBER TERM, 1975

CITIZENS FOR BALANCED ENVIRONMENT AND TRANSPORTATION, INC., ET AL., PETITIONERS

v.

WILLIAM T. COLEMAN, JR., SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners claim that an environmental impact statement should have been issued prior to the construction of 4.7 miles of highway that are being built by a state agency using state resources.

Since 1957, the State of Connecticut has been making plans to relocate and rebuild the portion of Route 7 between Norwalk and New Milford, a distance of 31 miles.[1] Anticipating that the federal government would assume approximately half of the cost of this construction, state officials submitted their plans to the Federal Highway Administration, at appropriate stages of the development,

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[1]The State has no plan calling for relocation and rebuilding of the highway north of New Milford.

for federal approval. During this process, a location hearing was held in 1964 and a design hearing was held in 1969.

The National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321 *et seq.* (NEPA) became effective on January 1, 1970, four days before federal officials approved acquisition financing for some portions of the proposed construction, and three months before final design approval was given for another portion.

Petitioners and others brought suit, contending that construction on Route 7 should be enjoined until an environmental impact statement discussing the effects of the proposed construction had been prepared. The district court issued an injunction, but only with respect to the portion of the highway running south from Danbury to Norwalk, in which the approval process had progressed to the design approval stage. *Committee to Stop Route 7 v. Volpe,* 346 F. Supp. 731 (D. Conn.). Federal officials, in cooperation with state officials, began to prepare an environmental impact statement for that segment; the statement has been in preparation for three years and has not been issued in final form. The Danbury to Norwalk segment remains subject to the injunction.

The State of Connecticut, believing that the 4.7 miles of highway north of Danbury (the Danbury-Brookfield segment) was important to State transportation needs,[2] decided to abandon their quest for federal assistance for the building of that segment and to commence construction using its own resources. Petitioners returned to the district court seeking to have the initial injunction enlarged to forbid construction of this segment as well. The court declined to enlarge the injunction or to issue a new injunction, concluding that, because the State is not relying upon federal funds to construct the segment, there is no

[2]The Danbury-Brookfield segment intersects with I-84, an important east-west highway completed in 1963.

major federal action requiring an impact statement (Pet. App. 14a-27a; 376 F. Supp. 806). The court of appeals affirmed (Pet. App. 1a-13a; 503 F.2d 601). The Danbury-Brookfield segment is under construction and more than 50 percent completed; the Federal Highway Administration estimates that the segment will be in service by November 1976.

1. Section 102(2) of NEPA, 42 U.S.C. 4332(2), provides that "all agencies of the Federal Government shall * * * include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement" on the environmental consequences of and alternatives to the proposed action.

Section 102(2) is thus addressed to "all agencies of the Federal Government" and since the State highway authorities are not an "agenc[y] of the Federal Government," they are not bound by the requirements of Section 102(2)(C) relating to impact statements. Petitioners' contention, which we discuss below, that the construction of the Danbury-Brookfield segment is "major Federal action" even though the State is building the segment without federal funds, overlooks the fact that an impact statement is not required in this case because those who propose to build and finance the building of the highway are not "federal agencies."

To be sure, two of the defendants are "federal agencies," and an injunction issued by the district court could run against them. The Department of Transportation and the Federal Highway Administration could, if Section 102(2)(C) requires an impact statement, be told that they must desist from further participation in this highway project until an impact statement has been prepared. However, because the State is proceeding on its own to construct the Danbury-Brookfield segment, nothing the two fed-

eral agencies could stop doing would be of any use to petitioners. The injunction they seek must run against the State officials and, as we have argued, they cannot obtain such an injunction because the State officials are not the "federal agencies" to which NEPA is addressed.

2. This Court pointed out in *Aberdeen & Rockfish R.R.* v. *SCRAP*, No. 73-1966, decided June 24, 1975 (*SCRAP II*) that "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action" (slip op. at 26; emphasis in original). Here the State officials do not have any proposal for federal action pending before the Federal Highway Administration, nor is the Administration preparing to make a recommendation or report with respect to the Danbury-Brookfield segment. The State is proceeding with construction without obtaining either federal approval or federal funds, and there is, therefore, no need for an impact statement even if a relevant "federal agency were involved and even if the construction were "major Federal action."

3. We turn to petitioners' central argument—that construction of the segment is "major Federal action." We submit that the concept of "major Federal action" does not include "action" no more extensive than, as here, participation in the formative stages of a project now entirely under state control. Although there are several cases, to which petitioners refer, holding that "major Federal action" in the highway planning and approval process takes place before federal funds are finally committed, we know of no case holding that there is such "action" when federal funds not only are not committed, but also are not contemplated to be committed. The Seventh Circuit has comprehensively analyzed a similar claim,

concluding (*City of Highland Park, Illinois* v. *Train*, No. 74-1271, decided June 10, 1975, slip op. 21-22; footnotes omitted):

> One case sustained a preliminary injunction against construction of a highway project for failure to comply with a federal location statute, holding that the project for a part of the federal-aid primary system became a federal-aid highway project for purposes of that statute when it received location approval prior to any application for federal funds. *La Raza Unida* v. *Volpe*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). That case was not decided under NEPA, which applies to proposed major federal actions and not to a federal-aid secondary designation that took place long before NEPA was adopted or to possible federal funding that is not proposed at present. And, as the district court in *River v. Richmond Metropolitan Authority*, [359 F. Supp. 611 (E.D. Va. 1973)] stated: "Notwithstanding the fact that *La Raza Unida* declared a highway project to be federal early in the planning process, it most assuredly did not hold that a project could be federal where no federal participation had ever taken place." 359 F. Supp. at 634. Possible future federal funding is all that the plaintiffs in the case at bar have shown.

The Lake-Cook Road improvement appears from the summary judgment papers to be a state project on which no federal action is proposed, and therefore, NEPA's requirement of an environmental impact statement does not apply to the project. See *Citizens for Balanced Environment and Transportation, Inc. v. Volpe*, 503 F.2d 601 (2d Cir. 1974); *Civic Improvement Committee v. Volpe*, 459 F.2d 957 (4th Cir. 1972); *cf. Bradford Township v. Illinois State Toll Highway Authority*, 463 F.2d 537, 540 (7th Cir. 1972), *cert. denied*, 409 U.S. 1047 (1972).

To the extent petitioners are arguing that an impact statement cannot routinely be delayed until federal spending is about to begin, we agree. NEPA requires the impact statement to accompany the "recommendation or report on a *proposal* for federal action" (*SCRAP II, supra*, slip op. at 26); the recommendation or report will, perforce, precede the expenditure of funds. But it is the nature of the *proposal* that sets the bounds of the federal action. If no major federal action is proposed, no impact statement is required. In this case no major federal action—the expenditure of federal funds—has been proposed, and therefore an impact statement is not required.

4. Petitioners contend (Pet. 16) that there is a conflict among the circuits and between panels of the Second Circuit. We submit, however, that for the reasons discussed in Paragraph 3, *supra,* there is no conflict among the circuits on the nature of "major Federal action." The cases upon which petitioners rely deal with proposals for federal action, and the question presented in them is one of timing: how near at hand must the proposed federal action be before an impact statement must accompany a recommendation or report? In this case, however, there is no federal action in prospect, either in the long run or the short run, with respect to the Danbury-Brookfield segment.

Petitioners' alternative contention that two panels of the Second Circuit are in conflict is not a ground upon which to seek certiorari. If there were a conflict between two decisions of the same court, it would be for that court to resolve. *Wisniewski* v. *United States,* 353 U.S. 901, 902.

5. Nor is there a conflict between the instant decision and the decision in *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation,* 508 F.2d 927 (C.A. 2), petition for a writ of certiorari pending *sub nom. Coleman* v. *The Conservation Society of Southern*

Vermont, Inc., No. 74-1413. The problems presented by the two cases are analytically distinct, and there is no need to consolidate them for disposition here or to hold the instant case pending disposition of *Conservation Society*. The *Conservation Society* court held that the Federal Highway Administration must prepare an environmental impact statement assessing the effects of building a superhighway through the entire 280 mile "Route 7 corridor." We have argued that this decision is incorrect and should be reversed. Even if it is correct, however, it holds only that there must be an "overall" assessment of the effects of a continuous highway through the corridor. This "overall' assessment can be provided without regard to the presence or absence of an impact statement for each short segment of the whole project. The *Conservation Society* court held that state officials have been contemplating federal action. That federal action, if it exists,[3] pertains to the corridor as a whole, and not to any particular constituent segment. There is nothing inconsistent, therefore, between requiring an overall impact statement and not requiring a statement on the Danbury-Brookfield segment. As the *Conservation Society* court itself explained (508 F.2d at 936, n. 43a):

> In a recent per curiam opinion, this Circuit affirmed a district court determination relating to a portion of the Route 7 corridor between Danbury and New Milford, Connecticut. * * * In that case the district court dealt solely with the question of whether or not there was federal action in the construction of the Danbury-New Milford portion of Route 7; it did not consider the issue of the necessity for an EIS covering the entire corridor. Thus, the affirmance by this Court

[3]The district court in *Conservation Society* expressly held (362 F. Supp. 627, 636 (D. Vt.)) that "there is no overall federal plan for improvement of the route 7 corridor * * *."

of Judge Newman's specific finding does not preclude, and is unaffected by, the present affirmance of Judge Oakes' general findings.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.